Constitutional Interpretation and Popular Representation in the US and Italy: Reflections on Ferrara's Theory of Intergenerational Sovereignty

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Abstract. The essay makes some reflections, from the point of view of the Italian constitutional justice system, on the theoretical position held concerning the "people's" representation through the interpretative work of the Constitutional Courts by Alessandro Ferrara in Chapter 6 of his monograph *Sovereignty Across Generations. Constituent Power and Political Liberalism*.

Keywords: constitutional review of legislation, Italian Constitutional Court, European multilevel constitutional system, constitutionalism, common law and civil law system

1. *Political Liberalism and Constitutional adjudication according to Ferrara's perspective of the 'intergenerational' people*

In Chapter 6 – titled "Representing 'the People' by Interpreting the Constitution" – of his Book, *Sovereignty Across Generations. Constituent Power and Political Liberalism*, Alessandro Ferrara presents a profound and intellectually stimulating analysis of the *judicial review of legislation* (also known as the *constitutional review of legislation*, or *judgment about constitutional legitimacy of laws*) from the perspective of political liberalism. He situates this analysis within the context of the "power (or mandate) to represent people" – a "people" which the Author views as an *intergenerational political subject*, distinct from the current "electorate" represented in parliamentary elected bodies. The Chapter offers a thought-provoking exploration of the ways in which the Constitution can be interpreted to represent the people.

The Chapter is structured into three main paragraphs, each of which provides a comprehensive exploration of the topic. These paragraphs are further divided into sub-sections, offering a detailed and systematic analysis of the subject matter.

The first paragraph of the Chapter, titled "The Democratic Legitimacy of Judicial Review Revisited", engages with various political theories on the democratic legitimacy of reviewing legislation through the Constitution. Professor Ferrara critically examines classical critiques that question the democratic legitimacy of the Court's role in constitutional justice. These critiques argue that the Supreme Courts or Constitutional Courts, being unelected, cannot be considered truly democratic and representative of the electorate.

Under this point of view, far from acting on *democratic* ground, those juridical bodies (*i.e.*, the Supreme Courts or the Constitutional Courts) are operating on an *epistocratic* base and are exercising a sort of perilous degeneration of the democratic State into a predominance of the "epistocracy".

The power wielded by Supreme Courts in resolving constitutional disputes often has a profound social-political impact, albeit one that is strictly *juridical* (or even better *judicial*) in nature. This power, therefore, has the potential to erode the public's trust in representative-elected bodies such as Parliaments and Congresses, a concern that should not be taken lightly.

In fact, when the Supreme Court scrutinizes a statute, and eventually declares it void, it may be perceived as a supervisor of the Parliament, who adopted that flawed legislation.

Furthermore, the Supreme Court's activism in safeguarding new constitutional rights, established through evolving interpretations of the Constitution, could cast a shadow over the Parliament's capacity to shape constitutional design and acknowledge these new rights through political means. This could lead to a decrease in public expectations of the legislator's ability to address and resolve political issues, potentially fostering disaffection towards political-democratic participation.

Simultaneously, an overemphasis on the judicial resolution of deeply political questions through the Court's cases and forms could erode public confidence in the autonomy and impartiality of the judiciary. This outcome could pose a significant threat from the perspective of political liberalism and for a Country founded on the rule of law.

The same first paragraph also addresses the crucial topic of *interpretative conflicts* that could arise regarding the Constitution. These conflicts might arise between different Supreme Court decisions over time (when the Court changes its interpretative position) and also between the Court and the Parliament. When the Court changes its former interpretations of the Constitution, while the constitutional text remains the same, this "conflict" between the court precedents can lead to criticism (by public opinion and by legal scholars) as the Court might be seen as an "errant interpreter" of the Constitution (because it has changed its ideas), eventually moved by new political interests. Therefore, this kind of conflict may put public confidence in the autonomy and stability of constitutional justice at risk. On the other hand, when a Supreme Court (or a Constitutional Court) affirms a "new" constitutional right as part of the "penumbra" of the Constitution's text (overthrowing previous decisions), the policies adopted by the Parliament may change accordingly to the new right. So, the new reading of the Constitution by the Court may provoke a conflict of policies between the Parliament (anchored to the previous reading of the text) and the Court itself. Then, a "conflict" between the Court and the Parliament may also be prompted, without any changing of interpretation, when the Parliament believes that the Court's constitutional interpretation, used by the same Court to annul a parliamentary statute, shall not be easily reputed as fully adherent to the Constitution.

Lastly, paragraph 1 reconnects those different interpretative evolutions upon Constitutional text made by the Court (evolutions that may raise "interpretative conflicts") to the debate – among legal scholars as well as political philosophers – between *originalism* and *living* approaches to constitutional interpretations. As is widely known, originalism pretends to read the Constitution by excavating and expounding the "original" intent of the Founding Fathers or Constituent Assembly, looking to the socio-political context and the words' ordinary meaning when the Constitution was passed. For the "originalist" legal scholars, therefore, interpretative conflicts between different readings of the Constitution are sporadic. While the text remains the same, and the text has to be interpreted in its "original" (once and for all) meaning, no "new" reading of the text may be developed by the Court (and no conflicts between older interpretations of the text, and evolutive interpretations may arise). On

the contrary, those who support the theory of a "living constitution" are in favor of a broader interpretation of the constitutional wording, trying to adapt the text – which cannot be amended by the Judiciary – to the current social-political waves, needs, and expectations of the present times. For the "evolutists" legal scholars, there might be "conflicts" between old and new readings, and that is not a pathology but a way to smoothly adapt the Constitution to emerging times.

It is worth mentioning that in this 1st paragraph of Chapter 6, Alessandro Ferrara re-evaluates the *querelle* between the "originalism" theory and the "living constitution" theory under the peculiar point of view of his political-philosophical perspective. For Ferrara, in fact, the question at stake here is how to "represent" the intergenerational people (*i.e.*, the *body politic across generations*). For Ferrara's point, the Supreme Court, by interpreting the Constitution, is exercising a sort of "representing function" of the political agreements and outcomes made by the "people" who were the author of the Constitution (by the elective Constituent body). In fact, by invalidating a statute passed by the Parliament because it is inconsistent with the Constitution, the Court is, under Ferrara's view, protecting the political will expressed by people who authored the Constitution, in respect of the political will, which is shown by the present electorate, represented in the Parliament. So, following Ferrara's theoretical path, an "originalist" Supreme Court appears to speak loudly in the name of the people who were born at the time the Constitution was drafted and approved (persons who might not be part of the present demos because they were dead in the meanwhile).

On the contrary, an "evolutive" Constitutional Court, even if it interprets a Constitution that was adopted by the "past people" (because the text interpreted is the same), seems to pay much more attention to the "present people". This evolutive approach to constitutional interpretation suggests that the Court, in interpreting the Constitution, tries to let the words of the Constitution evolve in a different meaning compared with the meaning the exact words had in the past. The Court tries to scrutinize the parliamentary statutes, also considering the constitutional text's possible evolutions- a text that the Court cannot modify - and not only the original intent of the author of the Constitution. This approach, according to Ferrara, marks a difference concerning parliamentary bodies, which "represent" from time to time, only the "current peo-

ple" who elected them (and not the people who were the author of the Constitution).

In the second paragraph of Chapter 6, titled "Interpreting the Constitution: The Mandate of the Interpreter", Ferrara immerses us in his political-philosophical analysis of the Supreme Courts (or Constitutional Courts) in constitutional democracies. His work is not just a theoretical exercise, but a significant exploration of the constitutional interpretation's mandate, vested upon the Supreme (or Constitutional) Courts, within a liberal democracy. He raises a crucial question that resonates with the ongoing debates in our society. It is clear that Constitutional Justices shall not have any power to amend or interpolate the text of the Constitution; it is a matter of debate if they have, or have not, allegiance to the cognitive assumptions of the Founding Fathers (or Constituent Assemblies).

Alessandro Ferrara traces the distinction between the specific "cognitive horizon" (a term referring to the collective understanding and knowledge) in front of the constituent power when the Constitution was crafted on one side and the potential spectrum of meanings the constitutional text may show, on the other side. This "cognitive horizon" represents the intellectual and cultural context within which the Constitution was written, and understanding it is crucial for interpreting the Constitution's original intent.

Of course, the "textual" meaning represents an anchor for any constitutional interpretivism by the Constitutional Justices. However, according to Ferrara, the Supreme Court (or a Constitutional Court) might not also be bound to the past cognitive horizon if the textual elements (such as specific clauses) are open enough to incorporate the new cognitive horizon of present times.

Under this point of view, in the same paragraph 2, the Author identifies different "types" of constitutional clauses: some of them are *rules*, which are specific and cannot be extended beyond their literal meaning (*i.e.*, the number of the members of Parliament or the age to be elected President). Others are *general clauses* or *standards*, which are more flexible and can incorporate new declinations of meanings (*i.e.*, the "due process of law", or the "equality before the law"). There are also some *implicit principles*, which are even more comprehensive than the general clauses (*i.e.*, the "democratic principle", the "separation of powers" principle) and not plainly

mentioned in the Constitution's text. They might be found and evoked by the Constitutional Justice interpreting the overall architecture of the same Constitution. According to Alessandro Ferrara, constitutional justice, in interpreting general clauses and principles under the light of the evolving society's cognitive horizon, may represent trans-generational people over time. In fact, not normatively bound to the cognitive horizon of the Founding Fathers (or Constituent Assemblies) in approving that wording, the Court may adapt the meaning of the same words to the new instances.

Finally, the same second paragraph of Chapter 6 evokes the contribution given by Constitutional Justice to the equilibrium between maintaining the authenticity of the Constitution (as the result of the people's will at the time the document was drafted and under the circumstances of its adoption) and the Constitution as an intergenerational political and legal fabric, which shall represent the present (and also the future) people. Here, the Author draws attention to the fact that the people's elected representatives (Parliaments or Congresses), through the mechanism foreseen by the same Constitution, may adopt Amendments in order to change the Constitution if and when the same people's political representative body believes the Supreme Court (or the Constitutional Court) veered off the constitutional tracks in its interpretive activity. In other terms, the Parliament (or the Congress) may consider that the interpretations of the existing Constitution, as adopted by the Supreme Court (or by the Constitutional Court), are "wrong." If that happens, the Parliament (or the Congress) may use the Constitution's Amending power to pass new constitutional provisions that cut off the "wrong" interpretations of the previous constitutional text made by the Court.

Of course, when and if the Constitution's amending power is evoked in order to fine-tune the constitutional meaning "against" the constitutional interpretations given, over time, by the Supreme Court, a matter of "institutional conflict" might arise. While the Supreme Court – in its activity – is pretending to expound the "authentic" meaning of the Constitution, and therefore the "authentic" will of the past people who adopted the same Constitution, the Parliaments, in changing the Constitution in order to counter-fight the Constitutional Justice's case-law, are representing the will of the living people (the present people who have elected those Parliaments).

Delving deeper, the subsequent paragraph 3 (titled: "The Normativity of the Most Reasonable and the Line between Interpreting and

Transforming") of the Chapter 6 intricately maps the political-theoretical terrain between interpreting the Constitution and transforming the constitutional law by influencing the meanings of the Constitution's text. Professor Ferrara illuminates that the Supreme Court (or a Constitutional Court) may unveil diverse interpretations of the precise constitutional text, particularly when the Court encounters general clauses or implicit principles. The Author posits that under liberal political theory, the Court, by interpreting the Constitution, embodies the people who adopted the Constitution. However, the Court operates ahead of the actual people. Therefore, the Court must proceed with caution. First, the Court must demonstrate that its opinion is based on exercising *public reason* by providing logical arguments. Second, in the face of multiple opinions and potentially different constitutional readings of the same "clause" or "principle," the virtue of the Court is to assume the *more reasonable*.

So, Chapter 6 offers an intriguing point of view about how, in Alessandro Ferrara's theory, political liberalism may read the role played by Constitutional Justice in *representing* the people across generations by interpreting the Constitution.

For the Author, in safeguarding the Constitution against the flaws of the parliamentary statutes, the Supreme Court has the crucial task of protecting the people, as the *transgenerational author* of the Constitution, against its pro-tempore living segment (the electorate).

For Professor Ferrara, the mandate of the Supreme Court as the highest judicial interpreter of the Constitution is bounded by the normative commitments of the transgenerational people and the overall political project expressed in the Constitution. However, the cognitive presuppositions of the Founding Fathers do not also astringe the Court. Therefore, the Court may eventually evoke different interpretations of principles and clauses written in the Constitution, of course, insofar as those interpretations are consistent with the semantics of the constitutional text. In doing that, according to political liberalism and in a functioning democracy, the Court, as Ferrara remarks, must provide the *public reasons* for each of its interpretative outcomes. These *public reasons* could include detailed explanations of the legal principles applied, the factual findings made, and the policy considerations taken into account. Those reasons must be proven to be the *most reasonable*.

According to Alessandro Ferrara's perspective, the relationship between the people and constitutional justice can be seen as a continuous "dialogue" between an "author" (the people, as the Constitution's author) and an "interpreter" (the Supreme Court) regarding the potential meaning or implications of a "text" (the Constitution). This applies particularly to the formulas of that text, which are crafted as principles or clauses with many interpretations.

Indeed, the Court serves as the ultimate interpreter, authorized by the Constitution, for decoding and updating the meaning of the Constitution's open clauses (such as "equal protection of the laws" or "due process") and implicit principles (such as "the separation of powers").

The people, author of the Constitution – in Ferrara's theoretical landscape – shall be considered as the *intergenerational people*: something different from the actual electorate, represented by the Parliament, and also something different from the original framers of the Constitution. This term, A*uthor*, refers to the collective entity that is responsible for the creation and maintenance of the Constitution. It represents the enduring values and principles that underpin the Constitution and are passed down across generations.

In fact, on one side, the Court, in *representing* the people across generations by interpreting the Constitution, may strike down the unconstitutional statutes passed by the Parliament representing the actual electorate. These could be laws that infringe upon the rights and freedoms guaranteed by the Constitution or that are inconsistent with its fundamental principles. On the other hand, the Court was not rigorously tied to the "cognitive horizon" of the Founding Fathers when they adopted the Constitution. So, the Court, in its activity, may acceptably actualize the interpretation of the constitutional open clauses to adapt them to the "present people" if the social, political, and cognitive landscape has been changed.

Of course, the Court cannot trespass the semantic boundaries of the text, nor can it adopt unreasonable interpretations of the same text. On its side, the Parliament may legally promote, exercising its Constitution Amending power, a new, different constitutional text if the constitutional interpretations provided by the Court sound unacceptable at all.

Therefore, according to Alessandro Ferrara's brilliant claim, the *intergenerational people* shall be considered *represented* by the activity of in-

terpreting the Constitution insofar as the constitutional interpretations offered by the Supreme Court are accepted by the *people*.

Ferrara argues that when the Supreme Court provides constitutional interpretations, they may be considered accepted by the public if no political actors attempt to challenge them through proper constitutional amendment procedures or by mobilizing the public against the Court's interpretation. In other words, if there are no efforts to legally promote a new constitutional interpretation or to counter-face the Court's interpretation, it is assumed that the people have accepted it. This acceptance is often based on the "public reasons" provided by the Court, which could include detailed explanations of the legal principles applied, the factual findings made, and the policy considerations taken into account.

It appears that Ferrara's thoughtful and authoritative analysis highlights the role of the Court in assessing the constitutionality of laws based on the *representation* of the *people* (perceived as *intergenerational body politic*), rather than the current *electorate*.

The Constitution places a significant responsibility on the Court, requiring it to invalidate laws passed by Parliament and approved by the living electorate if they violate the constitutional text, which was adopted by the people of the past. This text, while open-ended, contains implicit principles that the Court must interpret rationally. The Court, while not strictly bound to the epistemic horizon of the Constituent Fathers, cannot arbitrarily interpret the constitutional text, even in its vaguest clauses, according to an entirely "de-constructivist" approach. The Court is constrained by the possible meaning of the words and the necessary reasonableness of its interpretations. If the Court deviates from this, the political power may introduce new constitutional provisions or promote an overruling of the Court's previous opinion using the legal instruments provided by the Constitution for constitutional revision. It's crucial for the Court to adhere to these limitations, as the same dissenting opinions within the Court's panel may provide new interpretations.

By operating in this way, the Court – Ferrara seems to argue – can, according to the canons of political liberalism, help defend the constitutional text (and thus continue to represent the people who authored the Constitution) from illegitimate decisions taken by the political body representing the electorate. At the same time, the Court, with its ability to interpret the general clauses of the Constitution according to the

spirit (technological, social, economic) of times, plays a significant role in the development of the political-constitutional project through the evolution of the subsequent generations of the people.

2. *The* European model *of constitutional review of legislation*

The summary provided above of Chapter 6, from Alessandro Ferrara's Book, is only a basic and incomplete outline of a more nuanced and fascinating analysis that the author presents regarding the Constitutional Courts and their role in interpreting the Constitution in the context of liberal democracy. The Chapter should be deemed essential for both legal scholars and political philosophers to understand Constitutional Justice. However, it does not seem entirely futile to offer some further considerations.

It is worth noting that Chapter 6 discusses the constitutional review of statutes by widely following the A*merican model* (even if the same Chapter also makes some reference to the Italian Constitutional Justice).

From the perspective of an Italian constitutionalist, the A*merican model* stands out with the unique characteristics that set it apart from the E*uropean model* of *constitutional review of statutory law*, sparking curiosity and interest (Stone Sweet 2012; Bagni, Nicolini 2021; Caielli, Palici di Suni 2017; Pegoraro 2018).

Very briefly, it is very well known that the United States is a system of Common Law where, typically, the Judicial branch of government plays an influent and active role in the law-making process (even if it has been defined topically as the "least dangerous branch" because it has not the purse or the sword). In fact, following in the path of the British Common Law tradition, American judges may contribute not only to the interpretation and the application of statutory law, but also to the flourishing of the "common law" under their "precedents" (the *thema* decidendi of the pronouncement). This is done through the principle of *stare decisis*, which means that courts are bound by the decisions of courts higher in the hierarchy and must follow those decisions when the same legal issue arises in a later case. This principle is a crucial feature of the American legal system (as well as of the original British legal system) (Sacco, Gambaro 2018).

This peculiar activism of the Judiciary, whose case law is considered a source of law "in parallel" with the statutory law made by politically

elected bodies (Congresses or Parliaments), might have some implications in the dynamics of "giving voice to customs" (even if not "representing") the society (the people).

Not even in England (where judges are not elected but are installed by appointment drawn from the professional category of lawyers) or in the United States (where, at the federal level, judges are not elective but by appointment, and even at the state level, not all states have magistrates elected), one can speak of the Judiciary's function of "representing" the people.

Like their British counterparts, American judges are not primarily tasked with "representing" the people. Instead, their primary duty is to interpret and apply the "statutes" enacted by the legislature, which is an elective and political body. Even when precedent contributes to the development of new legal norms (common law), their role is not directly tied to the (elective and political) "representation" of the people but to the reasoned elaboration of the "customs" prevalent in society. This is in contrast to the European model, where the Judiciary's role is more focused on interpreting and applying the will of the legislative (political) power, without any binding role for future cases. This difference in approach has implications for the role of the Judiciary in respect of the *demos*.

Even in the United States, where the Supreme Court (along with other judges) reviews the constitutionality of laws, the judges do not "directly" represent the people, including those who "authored" the Constitution. Instead, they act by interpreting the Constitution, giving it a voice.

It is important to mention that the role of the Judiciary and constitutional justice in continental Europe, as well as in non-European countries that follow the same model, has a different historical background (Olivetti, Groppi 2003).

As it is very well known, European Continental States were, in the past, and still are today, grounded on the opposite principle of the Judiciary's subjection to the statutory law (the judge as *bouche de la loi*). Therefore, the judgments were not considered sources of law "deriving" spontaneously by the "customs" in the society expounded by the judges and maintained stable over time via the *stare decisis* principle. On the contrary, they were just perceived (as they still are today) as settlements of specific, singular disputes, adjudicated by interpreting and applying the will of the legislative (political) power, without any binding role for future cases. Even

if, also in the past and more today, the judgments of the highest courts (like the Court of Cassation or the Council of State) play a very significant role in orienting the interpretation of codes and statutes performed by the lower courts, those precedents still do not have any binding force. Thus, there would not be the possibility to establish, inside the Judiciary system, a unique, authentic interpretation of the statutory law (as well as the Constitution) insofar as each judge is not legally bound in its reading of the statutes (and of the Constitution) by an "ultimate" interpreter with authoritative power, except from the same Parliament (via a "interpretative statute" passed with legislative procedure and form). This historical background is crucial to understanding the unique characteristics of the European model of constitutional review (Grimm 2016; Amato, Clementi 2012).

At the beginning of liberal States in Europe, statutes (*i.e.*, Acts of Parliament) were considered the normative exercise of "parliamentary supremacy"; therefore, they were not intended to be subjected to the hierarchical authority of a "rigid" constitution.

Consequently, there was no room for an established system – like a Constitutional Justice in the U.S. – that may invalidate a statute for inconsistency with the Constitution.

Finally, it may also be noticed that in some European Continental States, the people were not the authors of the Constitution insofar as some of the Constitutions were granted *to* the people by the Monarch.

Following the historical experience of erosion and overthrow of liberal form of States in some European Countries (such as Spain, Germany and Italy), during the first decades of the XX Century, new constitutional and democratic regimes were established in Continental Europe in the aftermath of the Second World War. This was a response to the "capture" of the representative assembly by the action of totalitarian parties within the framework of plebiscitary forms.

Undoubtedly, the transition from parliamentary supremacy to the constitutional rule of law marked a monumental shift in both the legal and political spheres. This transformative change saw the emergence of new, rigid, and hierarchically superordinate Constitutions, designed to curtail the power of elected parliamentary majorities. Under this system, statutory law is bound by the procedures and boundaries of the Constitution, the supreme law of the Land. This Constitution, while unamendable, does provide a specific guaranteed procedure involving limits.

Moreover, these Constitutions played a pivotal role in safeguarding subjective rights, freedom, and social justice. They transcended the mere establishment of the State's structure, acknowledging and securing a broad spectrum of rights. These encompassed the right to freedom of speech, a fair trial, personal and domicile liberty, assembly and association, voting, and education and health. These rights were not subject to the whims of the elected majority but were the products of fundamental constitutional agreements. The protection of these civil, economic, and political rights led to the creation of autonomous and impartial mechanisms, detached from the political realm, which functioned as guardians of the constitutional assets (fundamental principles and rights) (Pegoraro, Rinella 2018; Ferreres Comella 2009).

Those new mechanisms could not be inserted into the traditional Judiciary (the Third Branch of Government) for the reasons briefly recalled above. Despite in the U.S., the European Continental judges were traditionally intended as "subject" to the statutory law so that they could not be vested with some power to "nullify" the statutes passed by the Parliament. Nor do the precedents play, in Continental Europe, the same role they have in the Anglo-Saxon tradition (such as in the U.S.). Therefore, there was not a "highest" judge whose ultimate constitutional interpretations could have become binding for all the other courts on a national basis. A patchwork of different constitutional readings for the same statute could have become the risky outcome of giving any judge the power to review the Act constitutionally. So even though the model of rigid Constitutions was spread overall Continental Europe, there was lacking some of the fundamental conditions to vest the Judiciary (and the Supreme Court of Cassation) with the power to scrutinize the Acts of the Parliament for constitutional compliance as happen in the U.S. starting from the landmark case, decided by the Supreme Court, M*arbury v.* M*adison* (1803).

While the Judiciary, like any other branch of Government, is anchored to the sovereignty of the people. The Judiciary, whose sentences are typically pronounced "in the name of the people," it is not "a representative" of the people. It was, and remains, a body deputed to the "administration" of justice and not to the "representation" of the people in solving cases. Therefore, the Judiciary is reconnected to people's sovereignty "through" the interpretation of statutory law adopted by the Parliament, which is the elected representative body.

In this context, the American model of constitutional justice, which Alessandro Ferrara extensively discusses in Chapter 6, would not have been readily transferable to the European continental landscape, highlighting the intriguing contrasts between the two.

Indeed, the contrast is stark. While the Supreme Court in the United States holds the ultimate authority in interpreting and applying the federal Constitution, each federal judge (and, in the individual states, each state judge) is tasked with evaluating the conformity of laws to the Constitution (Tushnet 2009). In contrast, in Europe (and in Italy), judges are not empowered to nullify the legislative will of the Parliament.

It might be of relevance to delve into the European model of Constitutional Justice to grasp its distinctiveness from the American one (Cappelletti 1971). This understanding will significantly enhance the interpretation of Chapter 6, particularly when viewed through the lens of the European (and Italian) model of Constitutional Justice.

The system of constitutional review legislative acts, widely adopted by continental western European States in the latter half of the XX century (and later transplanted to eastern European States after the collapse of the Warsaw Pact in the final decade of the same century), is fundamentally rooted (albeit with some variations) in the template proposed by Hans Kelsen. This template, originally crafted and adopted for the constitution of the Austrian Second Republic in 1920, holds significant historical importance in the development of the European model (Kelsen 1981).

This kind of "European model" is grounded on some key elements.

First and foremost, the European model places the power to scrutinize statutes for constitutional illegitimacy in a unique and centralized body, the Constitutional Court. This institution is distinct from the judiciary, serving as a separate entity.

One of the unique aspects of the European model is the Constitutional Court's monopoly on invalidating legal norms of an infra-constitutional nature, especially primary norms. This means that ordinary or specialized jurisdictions are prohibited from annulling a statute that fits into the case at the bench.

Importantly, the Constitutional Court is not an appellate jurisdiction from inferior courts. It does not resolve disputes between parties in a pending *real* case, but rather, it is the initial and final floor for constitu-

tional controversies. Its judgments become effective without the intervention of any other body.

However, notwithstanding the different nature of this Constitutional Court compared with the Supreme Courts of Judicature (like in Italian, the *Corte di Cassazione* for civil and criminal justice or the *Consiglio di Stato* for administrative justice), the body acts with likely judiciary nature and forms.

It is not a "political" control performed by a political body that represents the political unity of the people like it was in the thoughts of Carl Schmitt (Lombardi 2011).

The Constitutional Court is designed to be detached from politics, autonomous and independent. It is mandated to adjudicate constitutional cases under legal-constitutional arguments, exposed in opinions (typically only one, the Court's opinion) and pronounced as "in the name of the people". This detachment from politics ensures the Court's decisions are based solely on legal-constitutional arguments, fostering a sense of reassurance about the impartiality of its decisions.

However, it's crucial to recognize that the *Kelsenian* Court, due to the nature of the Constitution it interprets and the diverse conflicts it may be called upon to resolve (such as those between different state powers or at the national and sub-national levels of government), cannot be fully understood without acknowledging its *political sensibility* or role in a broader context.

Because the caseload of the European model of Constitutional Court shall not come from appeals or recourses by inferior jurisdictions, shaping the way to access the Court is of relevance.

The model typically offers two or three distinct ways of access. The first is exclusively available during a *concrete* pending trial. Here, when faced with significant doubt about the constitutionality of the primary norm the same judge must apply to resolve the case, the presiding judge can submit a motivated "question" to the Constitutional Court to verify the validity of their doubt.

The second way is through a recourse directly submitted to the Court from another branch of government (*i.e.*, a parliamentary minority, the President of the Republic, the National Government, or the Regional Government for disputes concerning regional/national competencies and powers under the Constitution).

The third way is by a direct complaint submitted by individuals (namely, collective groups, firms …) when those private subjects believe that their fundamental rights, affirmed in the Constitution, have been violated (and the other remedies have been exhausted).

It is intriguing to note that the "incidental access" – activated by a judge during a trial – does not present the *concrete* dispute but a *question* of the validity of the primary norm the judge applies to adjudicate the case, compared with the constitutional provision the judge doubts has been violated.

The second way of access – that related to a direct "recourse" by a state body – is naturally "abstract" insofar as the recourse shall be submitted even if a case has not been raised (and, eventually, even a preventive way: a proactive measure taken before the same bill has been finally signed into an Act). Under this point of view, even if – of course – the judgments of the Constitutional Court are able to mark the legal and social system deeply, the "Kelsenian" Court, referring to the constitutional theory developed by Hans Kelsen, is much more far from a sort of connection to the "people" (in its concrete life) than the American model of constitutional review. That may contribute to putting the "Kelsenian" Court virtually quite "distant" from the "people".

Insofar as the European model foresees a specialized Constitutional Court, different from the judges (while in the U.S. model of constitutional review of statutes is performed by the Judiciary), the recruitment of the components may be diverted from the one applied to ordinary judges. It may be tailored to the Constitutional Judiciary's specific nature, tasks, and position. It might be possible, like in Italy, that while the civil and criminal judges are mainly selected through a public concourse, a competitive examination open to all, (except for honorary judges), Constitutional Judges are elected or appointed. Typically, they must possess professional requisites as experts in law, which means they may have been law professors, former judges, or lawyers.

Furthermore, while the E*uropean model* presents peculiarities compared with the American one, it is worth mentioning that – as well as the U.S. Supreme Court, when adjudicates a question of constitutionality – the "Kelsenian" Court, when solving a dispute, must give defensible public reasons for its judgments, vested in legal arguments (Frosini 2022).

It might also be noted that in the E*uropean* model of constitutional review of legislation, as well as in the American one, when the Constitutional Court interprets the Constitution, the same Court contributes, by

its case law, to the development of constitutional law (under this point of view the Court is "just" an *interpreter* of the text, and *cannot amend the exact wording* of the constitutional text). Finally, like the U.S. Supreme Court, also the "Kelsenian" Constitutional Court when adopting a judgment of acceptance, a decision to nullify a statute, and therefore it nullifies a statute and contributes to the development of statutory law (by deleting pieces of legislation) (Florezak-Wator 2020).

3. *The Italian Constitutional Court and model of constitutional review*

After discussing the common features and differences between Continental Europe's and the American models of constitutional review of legislation, it is appropriate to briefly explain the Italian model of constitutional review (Barsotti, Carozza, Cartabia, Simoncini 2020).

As it is well known, Italy did not show proper constitutional jurisdiction until the advent of the Republic. The Constitution approved by the Constituent Assembly (popularly elected) foresaw a Constitutional Court, crafted on the "Kelsenian" model, with some peculiarities (Cartabia, Lupo 2022; Groppi, Simoncini 2023).

The Court is notably composed of fifteen judges: one-third appointed by the President of the Republic (without any political proposal by the Government); one-third elected by the Joint Session of Parliament (with very high majorities that favor the agreement between the parliamentary groups); and one third elected by the supreme courts. The members shall be full professors in law or lawyers trained at minimum for twenty years or the highest judges (even retired). They stay in office for a non-renewable term of nine years (the Court elects the President among one of the members).

The Italian Constitutional Court's responsibilities are multifaceted. It is tasked with identifying constitutional flaws in statutes and other primary sources of law (*review of legislation for constitutional illegitimacy*), to ensuring the adherence to constitutional rules in resolving disputes between different branches of the central State and between the central State and the Italian Regions (*constitutional disputes*). Additionally, the Court also handles cases of High Treason and attempts to overthrow the Constitution committed by the President of the Republic, and reviews the constitutionality of requests for abrogative referenda.

As is well known, there are two ways of accessing the Italian Constitutional Court to check a statute's constitutional illegitimacy (national or regional). One is *incidental*: by the judge in a pending trial, by submitting a question of constitutionality grounded on relevance and, at least, one minimum constitutional doubt). The second is *direct*: the Government can submit a constitutional claim against a regional law, and a Region may do the same against a national law or a law enacted by another Region.

The constitutional and statutory provisions governing the Court outline two possible outcomes of the constitutional review of legislation: a *judgment of acceptance* or a *judgment of denial*, apart from "inadmissibility judgments" (for procedural or political reasons). It is worth noting that the Court issues these judgments without the option to publish dissenting or concurring opinions. The vote is secret, and there is only the 'opinion of the Court'.

However, within this binary model (judgments of "acceptance" or of "denial"), the evolution of constitutional case law has crafted many subtypes of formulas. Very briefly, the Court might declare the unconstitutionality of a statute only in a "part" of the text because that part contains a specific rule, insulated from the rest, or because that part does not contain a specific (and unique) portion of text that must be added, or because it contains a part instead of another one to which it must be uniquely substituted (the so-called "manipulative judgments", because they "erase" or "add" or "substitute" a specific portion of legislative text in order to remove the constitutional flaw).

Also, the Court might ascertain the unconstitutionality of a statute only if it is interpreted in such a way, leaving the text intact but annulling a possible (unconstitutional) meaning (the so-called interpretative judgments because they declare the statute unconstitutional just if "interpreted" in such a way, leaving the text of the same statute intact).

A declaration of unconstitutionality has a broad impact. It nullifies the statutes for both future and past events, with a few exceptions. On the other hand, a dismissal decision does not prevent the raising of a new question in another case using different arguments.

When the Court dismisses the case by adopting a judgment of rebuttal, the same Court may also "warn" the legislative power (the so-called "exhortative" judgments). In those situations, the Court temporarily rejects the constitutional challenge (they are judgments of "dismissal")

but at the same time signals to the Parliament that those provisions contain some element of non-constitutional compliance that, if the Parliament does not change those elements, in a new case – if submitted of course – the Court will directly annul the statute.

In the Italian system of constitutional review of legislation, it's important to note that individuals do not have direct access to the Court. This is a key aspect of the legal process that the audience should be aware of, as it underscores the structured and regulated nature of the Italian legal system.

The incident way, on its side, requires that the question be relevant to the case, not in general for the "people". Suppose the judge might solve the pending case without applying the disputed provision. In that case, the question will be irrelevant and, therefore, shall not be submitted to the Court and will not withstand their social and political relevance. It cannot be said that the Constitutional Court is "far" from the "people" or that it is not acting by "representing" the people or giving voice to the people (the one who authored the Constitution). The institutional role of a "Kelsenian" model of Constitutional Justice is not to be a "political" or "representative" body (not a representative of the people who elected the Constituent Assembly or who voted for the Constitution, not a representative of the actual people or the future generations). What may be said is that by requiring the judge as a "gatekeeper" to knock on the Constitutional Court's door, the Italian model of constitutional justice may maintain effective statutes that are not in pursuance of the Constitution if a constitutional case does not arise during the pending trial.

The other powers of the Court are to resolve institutional disputes between the State and the Regions if those disputes do not involve a parliament law or a regional law (but, i.e., a regulation) and to adjudicate conflicts among different state powers. In performing this kind of activity, the Constitutional Court not only protects the constitutional rights that the adoption of an unconstitutional law might have violated, but it also safeguards the delicate balance and separation of powers among state institutions and, as Italy is a Regional form of State, between the national power and the regional power.

When these institutions assert that the authorities conferred upon them by the Constitution have been infringed upon by another branch of government, prior to this, such conflicts were not subject to judicial

resolution but were instead left to political remedies. Given that the Constitution is crafted to ensure that an impartial arbitral body applies the regulations governing the allocation of powers, these disputes have consequently been entrusted to the Constitutional Court.

4. *Interpreting the Italian Constitution in the European "multilayered constitutionalism"*

It would be indeed a wishful effort to apply Professor Ferrara's complex theoretical prism to the Italian machinery of constitutional review of legislation (above summarized) as the Constitution and the laws have established it and as it has been developed by the historical Court's case law and systematized by the abundant legal doctrine (Onida 2018; Zagrebelsky, Marcenò 2018; Ruggeri, Spadaro 2022; Cerri 2019; Malfatti, Panizza, Romboli 2021).

However, it seems not entirely useless to provide the following considerations about the role that the Italian Constitutional Court may perform in "representing 'the people' by interpreting the constitution" (quoting the exact title of Chapter 6 of Ferrara's book).

At the risk of appearing superficial and cursory, it must be noted that the Italian Constitutional Court, in its very initial period (at the beginning of the middle Fifties), faced the pre-Republican legislation (adopted under the Kingdom of Italy also during the fascist period).

Of course, it was legislation adopted under a profoundly different fundamental law and by a Parliament politically and institutionally divergent from the Republican Parliament. Under the Kingdom of Italy, the Senate and the House were less representative (as in the liberal period) of the "people" or non-democratic at all (under the dictatorship's period).

During this period, the Italian Constitutional Court, far from protecting the Constitution against the current electorate, represented by the Republican Parliament elected, had to affirm the new fundamental design of the Republic, crafted by the Constituent Assembly, against the past statutory law, passed by a legislative power that was limited, if not non-representative, of the electorate.

The Court's role evolved after this initial period, which was dedicated to purging unconstitutional provisions of the past codes and statutes. It

was now tasked with assessing the constitutional conformity of legislative provisions passed by the Republic Parliaments, elected on the basis of the Constitution.

Those were, of course, fully democratic and representative legislative bodies according to the same republican constitutional rules.

In the second period, during the Seventies and the Eighties, the Court's role evolved into a balancing act, weighing the various constitutional principles according to reasonableness. Profound political and social transformations marked this phase, and the Court demonstrated its adaptability by seeking a balance among the various interests and values involved in constitutional matters through the technique of balancing, grounded on the principles of reasonableness.

The subsequent "crisis" of the political system (during the Nineties), which had characterized the constituent phase and the republican life for fifty years, opened a new period for the Constitutional Court. It has been a period of institutional instability. The constitutional interpretation gradually became more characterized by a greater dynamism in terms of recognizing, within the general clauses of the Constitution, an expansive and evolutionary capacity that, by identifying the underlying principle or value of such clauses, allows the Court to resolve constitutional legitimacy issues even in respect of statutes facing "new" issues which were not present or foreseeable at the time the Constitution was written (*i.e.*, in the biomedicine sector). The Court tries to promote solutions that are authentically expressive of a democracy that respects the human person and is oriented towards individual and social progress within a territorial and cultural pluralism framework.

In a subsequent period, the Court was confronted with proposals for constitutional reform, some of which came to fruition. Particularly, in the context of the reform of the system of regional autonomies, the Court witnessed its role expand from that of a prevalent constitutional guardian of rights for possible violations by the legislature to that of a guardian of the spheres of legislative power between the State and the Regions (with respect to a complex division of competences envisaged by the reform).

More recently (in the last decade), the Court has further expanded its complex "dialogue" with the Judiciary (one may remember that the Constitutional Court is facing the judges both as they submit consti-

tutional questions and as they are the "terminals" of its interpretation of the Constitution). The nuances of the "interpretative judgments" by which the Court orients the evolution of statutory law according to the Constitution exemplify this "dialogue" between the Constitutional Court and the Judiciary.

At the same time, the Italian Court has increased its "dialogue" with the Parliament. The Court has sometimes signaled to the Parliament by its judgments (in a way "issuing a warning") that a piece of statutory law presents some elements of unconstitutionality, giving the Parliament time and opportunity to change it according to the Constitution.

The Court has been able to weave a fruitful dialogue with institutional actors: judges and Parliament. Moreover, it has been capable, in interpreting the constitutional text, not only of engaging in a sort of "dialogue" with the Italian people as the "author" (through the election of the Constituent Assembly) of the Constitution (recalling here Ferrara's thoughts about the relationship between the people and the Supreme Court in the U.S.).

Despite the difference that distinguishes the Italian system of constitutional justice from the American one, even the Italian Constitutional Court, in carrying out its function of interpreting the Constitution, has been faced with the delicate need to interpret wide-ranging clauses and principles that lend themselves to open and evolutionary readings by applying them to annul laws that are the result of the will of the Parliament representing the electorate. In carrying out this activity, the Italian Court – given that it is not an organ belonging to the circuit of popular representation and political-legislative decision-making, but rather an organ of constitutional guarantee – is called upon to be faithful to the constitutional text (the "original" one, fruit of the choices made by the past generation through the work of the Constituent Parties, and the amended the one, fruit of the choices made by Parliament using the power of constitutional revision). At the same time, the Court cannot shy away from offering an interpretation of the principles and general clauses of the constitutional text that are susceptible to multiple readings. In this work, the Court must try to find the balance between understanding the Constitution as a "living document" that, thanks to its open clauses and general principles, can "tell us" everything, even what it does not speak about, and sclerotizing the reading of the Constitution in such an originalist perspective as to result in anachronism.

It should also be stressed that in the Italian constitutional system, Parliament has the power to amend the constitutional text. This power is exercised through the constitutional revision procedures provided for by the Constitution itself. These procedures allow Parliament (and, under particular circumstances, the people via a confirmative referendum) to revise the Constitution, even going against the interpretative strands of the Constitutional Court. However, this power is not absolute. There are implicit limits (the fundamental principles and inviolable rights) that would not be constitutionally revisable in a pejorative sense (*e.g.*, repealing the personal liberty or decreasing the protection of the freedom of speech). It should also be noted that even if only under certain conditions, the people, through a confirmatory referendum, can pronounce directly on a constitutional reform.

Furthermore, there is even something to be added as food for thought.

In fact, in recent decades, the European Union, on the one hand, and the legal framework established by the Council of Europe and its European Convention on Human Rights, on the other hand, have also increased their relevance in constitutional matters.

On the one hand, the European Union has adopted a Charter of Fundamental Rights – mimicking the Bill of Rights present in the national Constitutions – and a Treaty that refers to the "common constitutional traditions" of the Member States as a foundational element of the European Union that the same European Union shall respect.

On the other hand, the European Court of Human Rights case law, developed upon the European Convention on Human Rights, addresses legal questions about the right's protections of "constitutional nature".

Put simply, while the Constitutional Courts (such as the Italian one) are also the guardians of the rights recognized and protected by the Constitution, one must consider that the European level of government (the EU and Council of Europe) also plays an active and extended role in affirming rights. This is where the concept of *supranational law* comes into play. The two levels of *supranational rights* protection have their own *supranational court* – the EU Court of Justice and the European Court of Human Rights – which actively interpret and enforce supranational rights, even in domestic law.

The "multilayered" system that rises from the interaction of national constitutional law and supranational law on European charters of rights

involves the national Constitutional Court – like the Italian Constitutional Court – and the judges of the Member States. In fact, the national Judiciary has to adjudicate also following directly and without exceptions the European Union law (if there is no doubt about its meaning and if it is not violating the fundamental principles and rights of the Italian Constitutional system. Applying the E.U. law by the national Judiciary means to follow the case law of the E.U. Court of Justice.

Furthermore, the national Judiciary has to interpret domestic law according to the European Convention on Human Rights' legal framework (if there is doubt of noncompliance with the European Convention on Human Rights, a question of constitutionality has to be submitted to the Italian Constitutional Court). Applying the European Convention on Human Rights also means following the established case law of the European Court of Human Rights.

It is beyond the scope of this brief commentary to make any thoughtful application to the European multilevel framework of Professor Ferrara's complex and brilliant reflections on the activity of constitutional courts in representing the "people" through constitutional interpretation.

However, one may suggest, merely for food for thought, that the Constitutional Courts today, in Italy and the other European States (for those states that adhere to the European Union and the European Convention on Human Rights) are no longer only called upon to dialogue with the author of the national Constitution (the people that that national Constitution has wanted and continues, over time, to want, as the expression of a fundamental political and legal project in which they recognize themselves). They are now also engaged in a dynamic dialogue with supranational bodies, reflecting the evolving nature of constitutional interpretation in the European context (Caravita 2022; Celotto, Tajadura, De Miguel Bárcena 2011; Ninatti, Piccirilli, Repetto, Tega 2023, Faraguna, Fasone, Piccirilli 2018, Martinico, Pollicino, 2010).

The Constitutional Court, in fact, is today "immersed" in a complex network of relationships with supranational judicial bodies, which are called upon to protect supranational charters of fundamental rights. However, unlike national constitutions, these charters are not, as yet, the outcome of the political will of a united (federal or national) people (or one that intends to perfect its union). They remain part of a multilevel system that is not organized in statutory form and is not based on a constitution in the

classical sense, resulting from a constituent assembly (or constitutional revision power) democratically representative of a body politic.

Therefore, in the European legal framework, the still open question – echoing Ferrara's thoughts – is not only how to represent an "intergenerational people", by interpreting the Constitution; it is also how to harmoniously interpret a "multilayered constitutional system". This system is composed of national Constitutions and national constitutional common traditions, as well as supranational charters on fundamental rights.

This raises the question of how to contribute to the creation of a "multilayered people" (and not only an "intergenerational one") encompassing both the European and national levels.

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